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IN THE UNITED STATES SUPREME COURT

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SUPREME COURT, U.S.

COLLEEN PARISH,	§	
Appellant,	§	
- v. -	§	CASE NO. 79-5694
CHARLES PARISH,	§	
Appellee.	§	

BRIEF IN OPPOSITION TO

"MOTION TO DISMISS PURSUANT TO 28 USC 2103"

-- In Appeal from the Supreme Court of Alabama --

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Birmingham, Alabama 35203
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Gould H. K. Blair

Now that Appellee has moved to "dismiss" Colleen's appeal "pursuant to 28 U.S.C. 2103", it becomes pertinent to remark: first, that the section cited quite explicitly does not authorize dismissal, but only the treatment of an appeal as a petition for certiorari; and, second, only "in a case where the proper mode of a review is by petition for certiorari". Thus would Appellee presuppose Colleen not to be before this honorable Court on appeal, where 28 U.S.C. 1257 clearly establishes that she is.

* * *

Appellee does not dispute that all procedures necessary to perfect Colleen's appeal to this Court have been timely instituted, nor does he deny that the questions arising under the federal Constitution were persistently raised in all courts below to the exhaustion of the appellate process within Alabama.

And one thing more. Appellee has not here -- nor has he ever, in any court below -- fairly joined issue with Colleen's position that the State enactment as applied, and as it has now been definitively construed, is utterly repugnant to Constitutional guarantees: (i) that American citizens shall be accorded the equal protection of the laws; and, (ii) that the laws to which Americans are subject shall meet Constitutional standards of certainty. NOR YET HAS ANY ALABAMA COURT.

Rather than recognize the existence of Colleen's rights as they derive from the United States Constitution, if only to demonstrate the infirmity of her position if it were infirm, Appellee has deliberately chosen to disregard those rights. IN THIS DISREGARD HE HAS BEEN JOINED BY EVERY ALABAMA COURT. Beyond all question, this is the most disturbing circumstance which has been brought to light through the working of the appellate process below.

If Achilles was seldom challenged to battle, the reason is not that he was easily defeated. The validity of Colleen's position has been unmistakeably if tacitly recognized in its very disregard by the Alabama courts. But consider the dignity of the rights those courts have thus ignored! There are no more sacred passages in the secular canon than those which Colleen Parish prayed in aid. But rather than acknowledge the existence of Constitutional standards to which they have, not infrequently against their will, been subject for two hundred years, the Alabama courts have once more joined in a conspiracy of silence so as to mute the voice of a State resident asserting the rights of a United States citizen.

This Court will recognize the phenomenon. From the reception accorded by the Alabama courts, one would imagine that instead of discoursing of Constitutional entitlements Colleen had filled the air below with imprecations and other indelicacies too indecent to mention. But in very truth, as the Jurisdictional Statement and exhibits thereto so amply attest, Colleen asked nothing more than that the courts below should take cognizance of the federal Constitution and of the decisions of this Court.

As exhibits to the Jurisdictional Statement, the Court is in possession of both the extensive Constitutional argumentation presented by Colleen and the opinions rendered below. From a reading of those opinions, can it be imagined that the federal Constitution and the United States Supreme Court exist?

The authority of this Court has been set at defiance (see the Jurisdictional Statement, pages twelve to sixteen). It is by reason of this, more than of anything else, that the onus lies so heavily upon this Court to reverse and, to that end, to review, the decisions below. It is true of Colleen, as it has in the past been true of many another Alabama resident, that if there were no United States Supreme Court, there would exist no United States Constitution.

* * *

It is no part of the instant submission to anticipate the argument Colleen expects to have the honor of presenting upon briefing the cause now docketed and before the Court on appeal. Several observations, only, may properly be contributed at this time.

1. Irrationality of classification would be inescapably established even if there existed nothing more than the holding that alimony must be terminated, mandatorily and irrevocably, upon a finding of "sexual" activity in the alimony-receiving former spouse (Exhibit "4", page four, second paragraph). This is because the duty of marital fidelity ends with divorce: O'Dell v. O'Dell, 57 Ala.App. 185, 326 So.2d 747, 750 (1976). The very existence of alimony, however, proclaims that divorce does not end the duty of support. Thus, it is patently absurd that alimony should be terminated, mandatorily and irrevocably, upon the occurrence of an event or events of which the alimony-providing former spouse has no basis to complain, being no wrong to him.

2. The subject enactment as it has now been definitively construed does not rationally promote any proper governmental purpose. In Eisenstadt v. Baird, 405 U.S. 438 (1972), for example, this Court struck down a statutory prohibition against the sale of contraceptives to non-married persons, noting that the

effect of the enactment in preventing pre-marital sexual activity (if such was its purpose) would be "only marginal".

It is categorically denied that the prevention of extra-marital "sex" is a proper governmental purpose, or that the state has a place in anyone's bed -- married, divorced, or single. Suppose it to be otherwise, however. The effect of the mandatory and irrevocable termination of alimony upon a finding of sexual activity is surely far worse than "marginal": it is to protract what might otherwise have been a passing affair by throwing the person deprived of the means of support into a state of dependence upon her partner in sin. The teaching of Eisenstadt v. Baird mandates reversal.*

As does the teaching of U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973). There the Court held that a prohibition against the allowance of food stamps to households containing unrelated members bore no rational relation to its professed purpose, the prevention of fraud. The present is surely an a fortiorari case. What rational relation has the subject enactment as construed to the prevention of extra-marital "sex", when it is only the alimony-receiving former

*Need the point be made that few persons engage in sexual activity in any event who believe that their doing so will be made the subject of public scrutiny?

spouse who is made to suffer? Will this Appellee contend that as an alimony-provider he is less concupiscent than is an alimony-receiver? Further: what rational relation has the enactment as construed to the public welfare generally, when its operation is triggered by "sex", but not by murder, rapine, or treason? And how likely is it that the prevention of "sex" is the purpose of the statute at all, when not even prostitution is a crime under Alabama law?

3. Further to the federal questions involved, reference is made to pages sixteen and following of the Jurisdictional Statement. Colleen Parish is entitled, absolutely and of right, to approach this honorable Court for the vindication of the rights of herself and of thousands of others under the United States Constitution.

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The conclusion of the courts below that the authority of the federal Constitution as interpreted by the United States Supreme Court may blithely be flouted is not one which is necessarily binding on this Court.